Supreme Court, U.S.
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No. 01-13

IN THE

Supreme Court of the United States

CONSTANTINE KOULEGEORGE,

Petitioner,

v.

STATE OF ILLINOIS HUMAN RIGHTS COMMISSION,
ILLINOIS DEPARTMENT OF HUMAN RIGHTS
and TEMPEL STEEL COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
ILLINOIS APPELLATE COURT, THIRD DIVISION, FIRST DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision by the Illinois Appellate Court is at odds with this Court's decision last year in the case of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

2. Whether the appellate court's decision implicates Federal case law under the ADEA because the Illinois Human Rights Commission and the Courts in interpreting the Illinois Human Rights Act, follow Federal case law under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a).

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Petitioner Constantine Koulegeorge respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the Illinois Appellate Court for the Third Division, First District.

OPINIONS BELOW

The January 29, 2001, opinion of the Illinois Supreme Court, which is reported at 193 Ill.2d 587, 744 N.E.2d 285, 253 Ill. Dec. 3 (2001), is set out at Appendix D. The September 29, 2000, Illinois Appellate Court opinion which is reported at 316 Ill. App.3d 1079, 738 N.E.2d 172, 250 Ill. Dec. 208 (1st Dist. 2000), is set out at Appendix A. The November 10, 1998 per curiam decision of the Illinois Human Rights Commission converting the Recommended Order and Decision of the ALJ at the Illinois Human Rights Commission which is not reported, is set out at Appendix B. The June 12, 1998, Recommended Order and Decision of the ALJ at the Illinois Human Rights Commission which is not reported, is set out at Appendix C.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Illinois denying leave to appeal was entered on January 29, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The ADEA, 29 U.S.C. § 623(a)(1), which, in pertinent part, states that, "It shall be an unlawful for an employer — employment practice for an employer to discriminate against (1) to fail or refuse to hire or to discharge any individual or

otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age."

The Illinois Human Rights Act, 775 ILCS 5/2-102, states in pertinent part that it shall be unlawful, "For any employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination or citizenship status." The term "unlawful discrimination" includes discrimination based on age which means "a person who is at least 40 years old." 775 ILCS 5/1-103.

A. STATEMENT OF THE CASE

1. Proceedings Below

Petitioner commenced this action in the Illinois Human Rights Department which then referred it for public hearing to the Illinois Human Rights Commission. He alleged that he was terminated by Tempel Steel and replaced by a younger individual because of his age, 52.

A public hearing was held in this case on February 2-3, 1998. At the close of petitioner's case, a directed verdict was granted in favor of the respondent employer, Tempel Steel. (27a).[1] Using the *McDonnell-Douglas v. Green*, 411 U.S. 793 (1973) method of proof, the ALJ decided that there was insufficient evidence of age discrimination to require the employer to proceed with its defense and issued a Recommended Order and Decision in favor of the employer. Her written opinion to this effect was entered on June 11, 1998. (43a).

1. References in this petition to "__a" are to the record below.

The Illinois Human Rights Commission in a per curiam decision, affirmed the ALJ's finding and converted her Recommended Order into a Final Order and Decision of the Commission on November 10, 1998. (25a).

The Illinois Appellate Court affirmed the Commission by order dated September 29, 2000, holding that despite alleged age biased comments that were made on decision makers and despite the employer's pattern of terminating older workers beginning in 1990, there was insufficient evidence to require the employer to proceed with a defense under *McDonnell-Douglas.* (19a).

The Illinois Supreme Court on January 29, 2001, denied the petitioner's petition for leave to appeal. (44a).

2. Statement of the Facts

Constantine "Gus" Koulegeorge was 52 years old at the time he was discharged by Tempel. (1a-2a).

Koulegeorge first went to work for Tempel in 1968. Koulegeorge first worked as an hourly-paid press operator in 1968 and progressed to a salaried position as the production control staff assistant.

Koulegeorge was terminated by Tempel in January of 1992. (3a).

Beginning in 1990, as Koulegeorge testified at the public hearing, ageist and suspicious comments were directed at Koulegeorge by Tempel's managers, specifically by Arthur Canning and Thomas Setlik. Canning was the Manager of Human Resources at the time. Beginning in 1990,

Koulegeorge started having weekly meetings with Canning. On the days he was supposed to have meetings with Canning, Canning would come up to him in the hallways and say to Koulegeorge, "Gus, are you still here? I am surprised you are still here." (35a).

Thomas Setlik, Tempel's Quality Assurance Manager who was involved in the decision to terminate Koulegeorge, started calling Koulegeorge down to his office to tell Koulegeorge, "Gus, you get paid top dollars, we'll see what we can do about you." (35a, 38a). These comments made Koulegeorge worry that something was going to happen to him. (4a).

The employee retained instead of Koulegeorge was Tom Klawitter. Klawitter at the time was 49 years of age. (4a). Koulegeorge filed his underlying charge of discrimination with the Illinois Department of Human Rights ("IDHR") on June 8, 1992. After that, the company replaced Klawitter with Paul Resborcheck on August 28, 1992. (41a).

B. Other Witness Testimony in Koulegeorge's Case-in-Chief

1. Jacinto Gabriel

Gabriel testified that Koulegeorge was terminated due to his age based on a pattern of age discrimination Gabriel himself observed and was victimized by at Tempel. He said that he personally observed that the company was systematically getting rid of all of the "older people" including him. (5a).

2. Larry McIntyre

Larry McIntyre worked for Tempel Steel on two separate occasions, the first from May of 1979 through March of 1981, the second from February of 1989 through September of 1993. (5a). He worked for Tempel as a security officer. (*Id.*). McIntyre's date of birth is July 26, 1938. When he was terminated, the second time he worked for the company, he was 55 years old. McIntyre testified that he noticed a pattern of Tempel terminating other workers and replacing them with younger workers.

At the close of Koulegeorge's case, the ALJ granted Tempel's motion for a directed finding thereby not requiring Tempel to put on a defense.

REASONS FOR GRANTING THE WRIT

I. THE ILLINOIS SUPREME COURT IN REFUSING TO GRANT THE PETITION TO APPEAL AND THE APPELLATE COURT DID NOT FOLLOW THIS COURT'S DECISION IN THE *REEVES* CASE

This case concerns the viability of this Court's decision and opinion in the case of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). In that case this Court indicated that cert was necessary to resolve a conflict amongst the Appellate Court regarding what evidence was necessary to prove a case using the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) indirect method of proof. 411 U.S. at 140, 83 S. Ct. at 2104.

There this Court held that in a case brought under the ADEA, under this Court's prior precedent in *Hazen Paper*

Co. v. Biggens, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993), that the plaintiff's age must have played a role in the decision making process of the employer. 530 U.S. at 141, 120 S. Ct. at 2105.

This Court noted that there are seldom any eye witnesses to the employer's mental processes so that the *McDonnell Douglas* framework, or some variant has been employed by the courts. *Id.*

In *Reeves*, the evidence which supported the plaintiff's case involved the testimony of two individuals, Chestnut and Sanderson. They alleged performance deficiencies of the plaintiff. Sanderson was not the plaintiff's supervisor but Chestnut was. Sanderson, accepted the negative assessment of plaintiff's job performance by Chestnut and relied on it to fire the plaintiff. 530 U.S. at 144, 120 S. Ct. at 2105.

There was evidence that the reasons suggested by Chestnut were false. 530 U.S. at 144-145, 120 S. Ct. at 2105. However as this Court noted, the courts below had ignored evidence in plaintiff's prima facie case. There was evidence that Chestnut had made derogatory, ageist comments which were directed to the plaintiff. He had also singled the plaintiff out for harsher treatment than he gave to the younger employees. Even though the plaintiff won at trial, the trial court took the verdict away and the Appellate Court held that the evidence produced was not sufficient. This Court reversed. 530 U.S. at 146-147, 120 S. Ct. at 2108.

This Court in *Reeves* held that the evidence produced by the plaintiff in the court below was enough for a trier of fact to believe that the employer's offered reason for his termination was false. Further this Court held that if the

reason given is false, that could be enough to sustain a verdict for the plaintiff. 530 U.S. at 146-149, 120 S. Ct. at 2108-2109.

This Court held that the comments made, even though they were not made by the actual decision maker and even though they weren't made at exactly the time plaintiff was fired, were sufficient for the jury verdict to have stood, and indeed, were enough for the case to survive summary judgment. 530 U.S at 150, 120 S. Ct. at 2110-2111.

The comments held to be sufficient were that Chestnut had told the plaintiff that he "was so old [he] must have come over on the Mayflower," and on only one occasion had told the plaintiff that he "was too damn old to do [his] job." 530 U.S. at 151, 120 S. Ct. at 2111.

In addition, the plaintiff in *Reeves* introduced evidence that although Chestnut was not the decision maker, that Sanderson was married to him so she listened to him and was influenced by him. 530 U.S. at 151-152, 120 S. Ct. at 2111. This Court concluded that the lower courts have been far too eager to grant summary judgment motions in age cases and have been far too eager to ignore comments made by people that show an age-biased environment. According this Court reversed the decision below 530 U.S. at 153-54, 120 S. Ct. at 2112.

The facts in this case are at least as good as the facts in *Reeves*. There is evidence of age-biased comments. There is evidence of a pattern of ageist behavior on the part of the company and there is evidence sufficient for a trier of fact to reject the explanation of the employer and allow this case to go forward.

II. THIS COURT'S ADMONITION IN *REEVES* CONCERNING RULE 50 MOTIONS APPLIES TO MOTIONS FOR A DIRECTED VERDICT

In addition to all of the above, this court in *Reeves*, also noted that the lower courts erred in their application of the standard of proof necessary to support a Rule 50 post-trial motion. This Court held that the courts "disregarded critical evidence favorable to the petitioner — namely, the evidence supporting petitioner's prima facie case and undermining respondent's nondiscriminatory explanation. . . . The court also failed to draw all reasonable inferences in favor of petitioner." 530 U.S. at 152-153, 120 S. Ct. at 2111.

The same could be said here. Based on the evidence produced here, the ALJ was wrong to grant a directed verdict. Indeed, under this Court's ruling in *Reeves*, an argument could be made that a verdict in favor of the plaintiff could have been entered. Therefore, the decision below must be reversed under this Court's clear precedent.

III. THIS PETITION SHOULD BE GRANTED AS IT IMPLICATES FEDERAL CASE LAW UNDER THE ADEA BECAUSE THE ILLINOIS COURTS RELY ON FEDERAL CASE PRECEDENT TO INTERPRET THE ILLINOIS HUMAN RIGHTS ACT WHICH PROHIBITS AGE DISCRIMINATION

As noted above, this case arises out of the Illinois Human Rights Act, 775 ILCS 5/2-102, which states in pertinent part that it shall be unlawful, "For any employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms,

privileges or conditions of employment on the basis of unlawful discrimination or citizenship status." The term "unlawful discrimination" includes discrimination based on age which means "a person who is at least 40 years old." 775 ILCS 5/1-103. It is a mini-ADEA like so many of the state Fair Employment Practices Acts.

The Illinois Courts and indeed the Illinois Human Rights Commission both look to Federal Court precedent to interpret the rules under the Illinois Act. *See Zaderaka v. Human Rights Commission,* 131 Ill.2d 172, 545 N.E.2d 684 (1989). Indeed, under *Zaderaka*, the Illinois Courts have adopted the Federal indirect method of proof set forth in *McDonnell-Douglas. See Southern Illinois Clinic, Ltd. v. Human Rights Commission,* 274 Ill.App.3d 840, 847, 654 N.E.2d 655, 660 (1995); *Marinelli v. Human Rights Commission,* 262 Ill. App.3d 247, 253-54, 634 N.E.2d 463, 469 (1994); *Clyde v. Human Rights Commission,* 206 Ill. App.3d 283, 291, 564 N.E.2d 265, 269 (1990).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Illinois Appellate Court.

Respectfully submitted,

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